National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 10, 2003

TO: F. Rozier Sharp, Regional Director; Leonard P. Bernstein, Regional Attorney; Michael McConnell, Assistant to Regional Director, Region 17

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Sheet Metal Workers, Local 146 (Lipscomb Auto Group), Case 17-CC-1224

This Section 8(b)(4)(ii)(B) case was submitted for advice on whether the Union's peaceful handbilling was unlawfully coercive because it did not identify the primary employer nor truthfully advise the public of the nature of the dispute.

The Region should dismiss this charge because peaceful handbilling is not coercive under DeBartolo,1 and the Board has found that even misleading handbilling is not coercive.2

FACTS

The Employer operates a retail automobile dealership selling cars manufactured by Mitsubishi Motors. The Union distributed handbills at the Employer's dealership on three occasions, from November 2002 to January 2003. The handbills purported to be a "public service message" from the Union, informing the public about Mitsubishi automobile recalls and other internal problems with Mitsubishi Motors.

The Employer discussed the handbilling with the Union handbillers on several occasions. On one occasion, a handbiller stated that the Union was handbilling because it had a dispute with Mitsubishi Caterpillar Forklift of America (Mitsubishi Caterpillar). The Employer replied that it had no relationship with Mitsubishi Caterpillar. On later occasions, a handbiller stated that the handbilling would cease if the Employer agreed to write letters to Mitsubishi Caterpillar and Mitsubishi Motors asking that the dispute with the Union be resolved. Although the Employer complied and wrote the letters, the Union's handbilling continued.

ANALYSIS

The Region should dismiss this charge because, under extant Board law, peaceful handbilling is not unlawfully coercive even if the handbill is misleading as to the nature of the primary dispute.

The instant handbilling is clearly secondary. It is directed at the Employer who is wholly neutral in the Union's dispute with Mitsubishi Caterpillar. However, this secondary handbilling has not been accompanied by picketing or any other confrontational activity that might be coercive. The handbilling thus falls outside Section 8(b)(4)(ii)(B) under DeBartolo.

The Employer argues that the handbills are unlawfully coercive because they do not identify the primary employer, nor truthfully advise the public of the nature of the dispute. However, the Board in Delta II, relying upon the Supreme Court's decision in DeBartolo, specifically rejected that rationale.

Delta II involved handbills and other publicity which truthfully set forth Delta's air safety record. The Union had a dispute with Delta's janitorial service contractor and not with Delta. The handbills thus were misleading as to the nature of the Union's primary labor dispute. The Board initially held that the misleading handbills violated Section 8(b)(4)(B), but did so without considering whether the handbills were coercive. See Delta I, 263 NLRB 996 (1982). When the Board reconsidered its decision in Delta II, after the Supreme Court had issued DeBartolo, the Board held that the handbills were not unlawfully coercive even though they were misleading.

The handbills in the instant case are misleading in the same manner as the handbills ultimately found lawful in Delta II. The misleading handbills here therefore also are wholly lawful unless the Board overrules that case.

The General Counsel has argued to the Board that large union banners are tantamount to signal picketing, and thus unlawfully coercive within Section 8(b)(4)(ii)(B), where the banners intentionally mislead the public as to the nature of the primary dispute.3 In arguing that large, misleading of banners are unlawfully coercive, the General Counsel gave the Board the opportunity to reconsider its decision in Delta II. However, the General Counsel did not explicitly ask the Board to overrule Delta II, and the Board could find that large misleading banners are tantamount to signal picketing without regard to its handbilling decision in Delta II.

We therefore conclude, relying upon extant Board and Supreme Court law, that the Region should dismiss this case, absent withdrawal.

B.J.K.

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1 DeBartolo Corp. v. BCTC (Florida Gulf Coast), 485 U.S. 568 (1988).

2 Service Employees, Local 399 (Delta Air Lines)(Delta II), 293 NLRB 602 (1989). 3 See, e.g., Carpenters Local 209 (Kings Hawaiian Restaurant & Bakery), Case 31-CC-2103, Appeals Minute dated September 25, 2002; Carpenters Local 1506 (Associated General Carpenters, San Diego Chapter), Case 21-CC-3307, Appeals Minute dated August 21, 2002. Cf. Mountain West Regional Council of Carpenters, Case 27-CC-873, Advice Memorandum dated December 18, 2002.